LATE TESTIMONY

Testimony before the House Committee on Transportation

By Kerstan Wong
Manager, Engineering Department
Hawaiian Electric Company, Inc.

March 12, 2012

SB 2873, SD 1
Relating to Environmental Impact Statements

Chair Souki, Vice Chair Ichiyama and Members of the Committee:

My name is Kerstan Wong and I am testifying on behalf of the Hawaiian Electric Company and its subsidiaries, Hawaii Electric Light Company and Maui Electric Company.

Position:

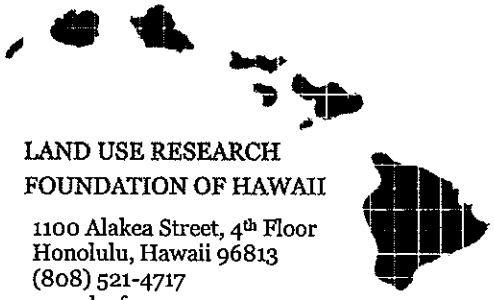
We support SB 2873, SD1.

Comments:

Current language in the bill places the responsibility on the Owner or Developer of the primary action to obtain documentation from the appropriate agency confirming that no further discretionary approvals are required. This is reasonable as we feel the Owner or Developer of the primary action is in the best position to comply with the requirements of the section since they are the entity that is causing the secondary action (utilities installed in the public right-of-way) to occur.

Thank you for the opportunity to testify on this matter.

LATE TESTIMONY



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March 11, 2012

Representative Joseph M. Souki, Chair
Representative Linda Ichiyama, Vice Chair
House Committee on Transportation

Opposition to SB 2873, SD1 Relating to Environmental Impact Statements ("EIS")
(Repeals the current exemption process and creates a new discretionary approval process by authorizing agencies to exempt certain secondary actions from the EIS law. Requires that applicants proposing certain actions identified in the EIS law prepare environmental assessments (EA). Requires the Office of Environmental Quality Control (OEQC) to determine whether preparation of an EA by an applicant is required in cases where it is uncertain which agency has the responsibility of determining whether an EA is required.)

Monday, March 12, 2012, 9:00 a.m., in CR 309

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF **strongly opposes SB 2873, SD1, which repeals the current EIS/EA exemption process for secondary actions and establishes a new "discretionary approval" process for exemptions. LURF supports, however, strongly supports the original version of SB 2873**, which provides for a permanent amendment to clarify current exemptions for secondary actions. We respectfully urge this Committee to amend this measure to its original intent and to a version similar to the original version proposed by the State Administration.

SB 2873, SD1. This measure amends Chapter 343, Hawaii Revised Statutes (the EIS law) to require an agency official make a discretionary decision and approval that certain secondary actions ***"may be exempt"*** from the EIS law; requires that applicants proposing certain actions identified in Chapter 343 prepare Environmental Assessments (EAs); requires the Office of Environmental Quality Control to determine whether preparation of an EA by an applicant is required in cases where it is uncertain which agency has the responsibility of determining whether an EA is required. **The bill would change the current law which has been working without problems for the past three years; create a new "discretionary approval" exemption process; and also add new requirements for agency staff and the head of the agency and possible lawsuits, which had not previously existed:**

(1) **Adds new requirements** which would require: (a) agency staff to ***gather information***, (b) agency staff to ***prepare an assessment,***

findings, and/or a report, (c) agency staff to ***review the information, findings and/or report, and make an agency decision*** that the secondary action is ***"ancillary or incidental"*** to the primary action, (d) an agency official must make a ***discretionary approval*** **that a secondary action** ***"may be exempt,"*** and (e) the agency must ***issue an "exemption"***;

(2) There is no statutory definition of a secondary action that is ***"ancillary"*** to the primary action;

(3) Would require agency staff to gather information, regarding whether a secondary action is ***"ancillary"*** to the primary action;

(4) There are no rules, no regulations and no statutory definition regarding what type of information is required to determine whether a secondary action is ***"ancillary"*** to the primary action;

(5) Creates opportunity for a lawsuit regarding the sufficiency of the information gathered by the agency to determine whether the secondary action is ***"ancillary"*** to the primary action;

(6) There are no rules, no regulations and no statutory criteria regarding what type of assessment, findings and/or report is required to allow the agency to determine whether a secondary action is ***"ancillary"*** to the primary action;

(7) Would require agency staff to prepare an assessment, findings, and/or report regarding whether a secondary action is ***"ancillary"*** to the primary action;

(8) Creates opportunity for a lawsuit regarding the preparation of information or report by the agency to determine whether the secondary action is ***"ancillary"*** to the primary action;

(9) There are no rules, no regulations and no statutory criteria regarding how an agency must make a determination whether a secondary action is ***"ancillary"*** to the primary action;

(10) Forces agency staff to make a determination whether a secondary action is ***"ancillary"*** to the primary action;

(11) Creates opportunity for a lawsuit regarding the agency determination regarding whether the secondary action is ***"ancillary"*** to the primary action;

(12) There is no statutory definition of a secondary action that is ***"incidental"*** to the primary action;

(13) Would require agency staff to gather information, regarding whether a secondary action is ***"incidental"*** to the primary action;

(14) There are no rules, no regulations and no statutory definition regarding what type of information is required to determine whether a secondary action is ***"incidental"*** to the primary action;

(15) Creates opportunity for a lawsuit regarding the *sufficiency of the information* gathered by the agency to determine whether the secondary action is ***"incidental"*** to the primary action;

(16) There are no rules, no regulations and no statutory criteria regarding *what type of assessment, findings and/or report* is required to allow the agency to determine whether a secondary action is ***"incidental"*** to the primary action;

(17) Would require agency staff to *prepare an assessment, findings, and/or report* regarding whether a secondary action is ***"incidental"*** to the primary action;

(18) Creates opportunity for a lawsuit regarding the *sufficiency of the preparation of information or report by the agency* to determine whether the secondary action is ***"incidental"*** to the primary action;

(19) There are no rules, no regulations and no statutory criteria regarding *how an agency must make a determination* whether a secondary action is ***"incidental"*** to the primary action;

(20) *Forces agency staff to make a determination* whether a secondary action is ***"incidental"*** to the primary action;

(21) Creates opportunity for a lawsuit regarding the *agency determination* regarding whether the secondary action is ***"incidental"*** to the primary action;

(22) There are no rules, no regulations and no statutory criteria regarding *how an agency official makes a* ***decision and discretionary approval*** that a secondary action ***"may be exempt"*** from Chapter 343;

(23) Requires an agency official make a ***decision and discretionary*** **approval** that a secondary action ***"may be exempt"*** from Chapter 343; and

(24) Creates opportunity for a lawsuit regarding the ***decision and discretionary approval*** by an agency official that a secondary action **"may be exempt"** from Chapter 343.

On the other hand, the **original version of SB 2873,** which was proposed by the State Administration as part of the Governor's legislative package, made permanent the current exemption for secondary actions within the highway or public right-of-way and provided that applicants prepare EAs when required.

LURF's Position. LURF **supports the original version of SB2873**, as it would allow the Department of Transportation ("DOT") and the Department of Health's Office of Environmental Quality Control ("OEQC") to avoid unnecessary work effort on the processing of minor secondary actions which would clearly be exempt from EA

requirements. The reasons for LURF's support of the original version of SB 2873 are as follows:

- **"If it ain't broke, no need to fix it."** In 2009, before the existing law was passed, the legislature found that OEQC "is overwhelmed by the number of requests...for action reviews, which has created unnecessary delays for actions that would clearly be exempt" from the EA requirement. The existing law which exempts secondary actions has been in effect since 2009, and for the past three years, the backlog of requests and delays are gone, and there have been no major problems or complaints.

- **The existing law is based on stakeholder consensus.** The existing law was a result of a consensus between various government agencies, OEQC parties who prepare EAs and EIS, and those landowners and developers who will be the most directly impacted.

- **Current law relieves unnecessary major backlogs, delays and expenses.** The existing law was passed as Act 87 (2009) as a result of unnecessary major backlogs, delays and expenses to private individuals and agencies. In 2009, the DOT and the OEQC were inundated with a large number of minor secondary action project reviews, which greatly increased the processing time and expense for applications affecting rights-of-way, including, in some cases, requiring EAs for telephone and cable telephone connections.

- **Sufficient environmental oversight exists on "primary actions."** Sufficient oversight will continue to exist for "primary actions," on private property which is outside of the highway or public right of way, as applicants for such actions will continue to be required to prepare an EA or and EIS relating to the proposed action at the earliest practicable time.

LURF **opposes the SD1 version**, based on, among other things the following:

- **SD1 is not based on stakeholder consensus.** The revisions proposed by SD1 did not go through the collaborative process with agencies and parties who prepare EAs and EIS, and those landowners and developers who will be the most directly impacted. We understand that DOT does not support the current SD1 version.

- **The SD1 version defeats the purpose of the exemption, and is not an exemption at all – it creates yet another discretionary approval process.** SD1 adds new requirements which would require: (a) agency staff to gather information, (b) agency staff to prepare an assessment, findings, and/or a report, (c) agency staff to review the information, assessment, findings and/or report, (d) the making of an agency decision that the secondary action is ***"ancillary or incidental"*** to the primary action, and (e) an agency official must make the determination that a secondary action ***"may be exempt"*** from Chapter 343; and the agency must actually issue an **"exemption" decision**;

- **Creates unnecessary additional staff work (and positions?) and project-related expenses.** It would require agency staff to do research, a review and prepare two new "findings" (1) that the secondary action is

"ancillary" to the primary action, or (2) that the secondary action is ***"incidental"*** to the primary action.

- **Could create more expenses for agencies and private applicants to do another assessment or report regarding "findings" of "ancillary and incidental."** In order to gather the necessary information to prepare an assessment or report to determine whether a secondary action is ***"ancillary or incidental"*** to a primary action, the agency staff, could require the applicant's consultant to prepare an assessment or report similar to an EA!

- **Creates opportunities for lawsuits relating to the sufficiency of agency information gathering, review, findings, assessment, or report.** The new requirements for ***"ancillary or incidental"*** determinations would provide an opportunity for lawsuits, challenging the sufficiency or insufficiency of the information gathered by agency staff; staff review and preparation of "findings, assessments or reports."

- **Creates additional opportunities for lawsuits relating the finding that the secondary action is "ancillary or incidental to the primary action."** It would provide a third opportunity for lawsuits, challenging the agency staff's finding that the secondary action is "ancillary or incidental to the primary action."

- **Creates additional opportunities for lawsuits relating to the *decision and discretionary approval* that a secondary action *"may be exempt."*** It would provide a more opportunities for lawsuits, challenging the decision and discretionary approval of the agency official that the secondary action "may be exempt" from Chapter 343.

- **Lawsuits based on HD1 could stop major projects important to the State and Hawaii's economy.** The lawsuits based on the SD1 version could stop or delay many projects, including the Governor's New Day proposals and public-private partnership projects approved by the Public Lands Development Corporation.

For the reasons stated above, LURF is in **opposition to SB 2873, SD1**, but **strongly supports the original version of SB 2873**, and respectfully urges your favorable consideration of this bill.

Thank you for the opportunity to present testimony regarding this matter.

THE SENATE
TWENTY-SIXTH LEGISLATURE, 2012

STATE OF HAWAII

S.B. NO. 2873 S.D. 1 Proposed HD1

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL IMPACT STATEMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 343, Hawaii Revised Statutes, is amended to read as follows:

"**§343- Exception to applicability of chapter.** (a) Notwithstanding any other law to the contrary, if at the time an application for a secondary action is submitted, a [any] primary action that requires a permit or approval [that] is not subject to a discretionary consent, and that [involves a] secondary action is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway, that secondary action shall be exempt from this chapter[.]; provided that the applicant for the primary action shall submit documentation from the appropriate agency confirming that no further discretionary approvals are required.

(b) As used in this section:

"Discretionary consent" means:

(1) An action defined in section 343-2; or

(2) An approval from a decision-making authority in an agency, which approval is subject to a public hearing.

"Infrastructure" includes waterlines and water facilities~~,~~; wastewater lines and wastewater facilities~~,~~; gas lines and gas facilities~~,~~; drainage facilities~~,~~; electrical, communications, telephone, and cable television utilities~~,~~; and highway, roadway, and driveway improvements.

"Primary action" refers to any action outside of the highway or public right-of-way that is on private property.

"Secondary action" refers to any infrastructure within the highway or public right-of-way."

This Act shall take effect on July 1, 2009[, and shall be repealed on July 1, 2013].

SECTION 2. Chapter 343-5(c), Hawaii Revised Statutes, is amended to read as follows:

"(c) Whenever an applicant proposes an action specified by subsection (a) that requires approval of an agency and that is not a specific type of action declared exempt under section 343-6, the agency initially receiving and agreeing to process the request for approval shall require the applicant to prepare an environmental assessment of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; provided that, for an action

that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time. The final approving agency for the request for approval is not required to be the accepting authority."

SECTION 3. Chapter 343-5(d), Hawaii Revised Statutes, is amended to read as follows:

"(d) Whenever an applicant requests approval for a proposed action and there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of determining whether an [preparing] environmental assessment is required, the office, after consultation with and assistance from the affected state or county agencies, [shall determine] may recommend which agency shall [prepare the assessment]determine whether the preparation of the assessment by the applicant is required."

SECTION 4. Statutory material to be repealed is bracketed and new statutory material is underscored.

ichiyama1 - Curl

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Monday, March 12, 2012 7:50 AM
To: TRNtestimony
Cc: Gqm@biahawaii.org
Subject: Testimony for SB2873 on 3/12/2012 9:00:00 AM

Testimony for TRN 3/12/2012 9:00:00 AM SB2873

Conference room: 309
Testifier position: Support
Testifier will be present: No
Submitted by: Gladys Marrone
Organization: Individual
E-mail: Gqm@biahawaii.org
Submitted on: 3/12/2012

Comments:
Strong support.

Thank you.